Putting net neutrality in context

February 27 2015, by Allen Hammond

Your company's wires travel over public property. Credit: Paul Sableman, CC BY

After much litigation, public demonstration and deliberation, the US Federal Communications Commission (FCC) voted 3 to 2 to adopt open internet rules. While the substantive details of the decision are not yet known, the rules, as expected, reclassified "retail" internet service to subscribers as common carriage – meaning providing non-discriminatory

service to customers. Internet Service Providers (ISPs) may not block, impair or favor particular traffic, users or content. The Commission also extended its jurisdiction to cover the exchange of data traffic via network interconnection between edge providers like Netflix and ISPs like Comcast, employing a general conduct rule reinforced by use of a case by case process. Proponents of net neutrality are lauding the FCC's move.

Whether you side with the ISPs and network equipment manufacturers or with the edge providers who supply content and the American public, it's essential to place the net neutrality decision in context. The usefulness of a network is determined by the number of people it connects and the number of functions and services it provides. As telephone, cable and wireless networks have evolved into broadband networks, they've expanded the number of people they connect and functions and services they provide access to. As more commerce, government services, employment opportunities and educational opportunities have migrated to the internet, the utility of broadband networks has increased and access to them has become essential for consumers as well as businesses, governments, services and educators.

Ownership of an increasingly essential network that connects each to all presents significant opportunities for conflicts. As FCC Chairman Tom Wheeler stated in his remarks: "We know from the history of previous networks that both human nature and economic opportunism act to encourage network owners to become gatekeepers that prioritize their interests above the interests of their users." Open internet proponents worried about just these kinds of possibilities: ISPs handling different types of internet traffic in different ways and at different prices.

The French have a saying: "Plus ça change, plus c'est la même chose." The more things change, the more they remain the same. This certainly applies to net neutrality. The dilemma faced by the FCC is not new. This

isn't the first time the government has wrestled with the question of how to apportion rights between private media owners and the public.

Mass media and the public/private compact

Like the telephone, broadcast and cable predecessors from which they evolved, the wire and mobile broadband networks that carry internet traffic travel over public property. The spectrum and land over which these broadband networks travel are known as rights of way. Congress allowed each network technology to be privately owned. However, the explicit arrangement has been that private owner access to the publicly owned spectrum and rights of way necessary to exploit the technology is exchanged for public access and speech rights.

The telephone company monopoly's use of public rights of way came with common carrier non-discrimination obligations. The broadcaster's receipt of exclusive use of a coveted radio spectrum license came with public trustee obligations. Similarly, a cable operator's essentially exclusive local franchise came with obligations to provide public, educational and government access channels.

Except under very limited circumstances (violation of criminal law), the telephone company could not deny service based on content. And, while the broadcaster's programming choices were largely insulated from government oversight, the broadcaster was still responsible for providing public access to news, public affairs and political speech. Finally, the cable operator could exercise substantial editorial control over most channels, but larger cable systems had to set aside channel capacity for the public. Each of these compromises was deemed constitutional by the courts.

Weakening the compact

Until recently, the Commission has favored corporate consolidation and corporate speech over public access and public speech. In telephony, AT&T's progeny were allowed to combine and acquire their competitors. Meanwhile, carrier reluctance to upgrade service or in some cases expand service or continue service into less profitable rural and poor areas of the nation has been allowed to undermine the goal of universal service and equitable access.

In broadcasting, the relaxation of the multiple ownership and cross-ownership rules priced the vast majority of Americans out of the market for broadcast speech. Meanwhile, repeal of the Fairness Doctrine, and diminished government oversight, removed the incentive for fair and balanced news and representative public affairs reporting. This ultimately left the concept of "fair and balanced" to serve as the butt of comedic parody.

In cable, a nationwide reduction in the funding of access channels was precipitated by a combination of cable operators, new state franchising laws and local government funding decisions. Over 100 public and educational channels have disappeared since the mid 2000s. According to a 2010 study, the resulting access center closures and funding cutbacks have disproportionately affected minority communities.

Plus ça change, plus c'est la même chose

Credit: Chris F from Pexels

Over this same time period, telephone, broadcast and cable networks have evolved into broadband networks. Until recently, the FCC eschewed extension of access regulation to broadband. Efforts to extend the telephone common carriage or cable access channel regulations to broadband were declined in favor of so-called unfettered telephone and cable network evolution into and expansion of broadband networks.

However, recently, the FCC was confronted with instances of broadband providers throttling user traffic, refusing carriage based on content and leveraging their network position to charge more for access. The resurfacing of these owner practices reintroduced the historical dilemma

of how to best protect and assure public access and speech rights on private networks using public property.

The reclassification of ISPs as common carriers brings us back to the beginning, after learning yet again, what the prescient 1934 Congress that passed the original laws knew: privately owned media facilities essential to public speech must be available to all.

The Commission follows through

The hearing and vote – before an audience of Commission staff, press and interested parties like Etsy CEO Chad Dickerson and Veena Sud, executive producer of The Killing – at times had the feel of a political rally or revival meeting rather than a staid administrative hearing. The elation and enthusiasm of the audience periodically erupted in a call and response support or challenge to particular Commissioner comments.

The stark contrast between the perspective of the majority and that of the dissent was palpable, and the vote was made along party lines, with democrats in favor and republicans against. Commissioner Mignon Clyburn pointedly emphasized that:

Absent the rules we adopt today…any Internet Service Provider (ISP) has the liberty to…block, throttle, favor or discriminate against traffic or extract tolls from any user for any reason or for no reason at all."

Commissioner Jessica Rosenwercel acknowledged:

We…have…a duty to protect what has made the internet the most dynamic platform for free speech ever invented. It is our printing press. It is our town square. It is our individual soapbox—and our shared platform for opportunity. That is why open internet policies matter. That is why I support network neutrality.

By contrast, Commissioners Ajit Pai and Michael O'Rielly's portrayals of the Commission's actions were dire. Commissioner Pai insisted that the Commission's "order imposes intrusive government regulations that won't work to solve a problem that doesn't exist using legal authority the FCC doesn't have."

Commissioner O'Rielly opined that:

t is hard for me to believe that the Commission is establishing an entire Title II/net neutrality regime to protect against hypothetical harms. There is not a shred of evidence that any aspect of this structure is necessary.

The publication of the final draft of the rules is subject to the Commission's duty to incorporate and answer the issues raised by the two dissents. Once the responses to the dissents are included, the Commission will publish the rules online and submit them to the Federal Register for official publication.

Broadband networks have given the American people a platform as ubiquitous as telephone, with content richer and more diverse than cable, rendering everyone a potential broadcaster and entrepreneur. Throughout the course of the 10 year net neutrality debate there were times when the Commission appeared to have given away the internet. Today, they gave it back.

Source: The Conversation